

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CATHERINE J. DEIST
Claimant

VS.

DILLON COMPANIES, INC.
Respondent
Self-Insured

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Docket No. 213,485

ORDER

The applications of both claimant and respondent for review of the Award entered by Administrative Law Judge Bruce E. Moore dated May 13, 1997, came on before the Appeals Board.

APPEARANCES

Claimant appeared by and through her attorney, Jan L. Fisher of Topeka, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Respondent raises the following issues for review by the Workers Compensation Appeals Board.

- (1) Whether claimant met with personal injury by accident arising out of and in the course of her employment on the date alleged.
- (2) Whether the administrative law judge properly calculated the permanent partial disability in the award.

Both claimant and respondent raised the following issue for review by the Workers Compensation Appeals Board:

The nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

With regard to whether claimant suffered personal injury by accident arising out of and in the course of her employment with respondent, the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts them as its own findings and conclusions as if specifically set forth herein. The Appeals Board finds it significant that the allegations of claimant that she suffered accidental injury are basically uncontradicted by respondent. Claimant's contention that her back injury stems from the injury of December 29, 1994, is supported by the record. The failure by claimant to mention the low back injury when she was first examined by Richard L. Watson, M.D., her family physician, is not sufficient to overcome claimant's testimony. It is also significant that the medical evidence supports a finding that claimant was experiencing hip and knee complaints as early as January 13, 1995. This, when considering claimant's testimony regarding the aggravation created by her use of crutches and the air cast and increased symptomatology to her low back, is sufficient to persuade the Appeals Board that claimant did suffer personal injury by accident to both her left ankle and her low back arising out of and in the course of her employment with respondent with a December 29, 1994, date of accident.

The Appeals Board will first consider the functional impairment appropriate in this circumstance. The medical evidence to Pedro A. Murati, M.D., is uncontradicted. While he first assessed claimant a 22 percent whole body functional impairment, this figure was amended at his deposition to show a 16 percent functional impairment to the body as a whole. Dr. Murati's modification stems from his discovery that he had provided claimant a double functional impairment stemming from the surgeries to her low back. The Appeals Board finds the uncontradicted medical opinion of Dr. Murati that claimant suffered a 16 percent whole body functional impairment to be appropriate and adopts this finding as its own.

The Appeals Board will next consider, under K.S.A. 44-510e, the amount of tasks loss suffered by claimant as a result of this injury. Again, the opinion of Dr. Murati is uncontradicted in that claimant has suffered a 47 percent loss of ability to perform tasks which she performed over the 15 years prior to the injury. This 47 percent tasks loss is adopted by the Appeals Board.

The Appeals Board will next consider the arguments of the parties regarding the application of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995). The Administrative Law Judge found claimant refused accommodated work offered by respondent and went on to find that this refusal was unreasonable on claimant's part. The Appeals Board agrees with this conclusion. The representatives of respondent, Mr. Steve W. Sherman and Mr. Mark Scheffler, both testified regarding the intentions of respondent in attempting to accommodate claimant's limitations and restrictions. Both were given the opportunity to review certain restrictions placed upon claimant by Dr. Murati and both agreed these restrictions could be met. The modifications and accommodations offered to claimant were within claimant's limitations and restrictions. Dr. Murati agreed, after having had the opportunity to review the video tape of the various jobs in question. Claimant's four-hour term of employment on August 19, 1996, apparently caused her little or no discomfort. Mr. Scheffler testified that she exhibited no difficulty in performing those tasks. Dr. Murati opined that claimant should have had no difficulty in performing those tasks. The Appeals Board finds claimant's refusal to attempt any further accommodated work unreasonable and in violation of the policies set forth in Foulk, *supra*. As such, the Appeals Board finds, subsequent to August 19, 1996, claimant is entitled to a loss of wage which must take into consideration the accommodated work offered by respondent.

In computing claimant's award, the Administrative Law Judge granted claimant temporary total disability compensation at the rate of \$141.05 per week based upon the average weekly wage of \$211.56. The Appeals Board finds this calculation to be correct. Claimant's temporary total disability compensation was paid prior to her termination of employment on February 26, 1996. On this date claimant was released by Dr. Murati to return to work and was advised by respondent no accommodation was available. While the record is unclear as to exactly when claimant's fringe benefit of \$101.95 were terminated, common sense would suggest at the time of claimant's termination, the fringe benefit package would cease. The Administrative Law Judge in assessing claimant a 73.5 percent work disability, which is comprised of the 47 percent tasks loss and a 100 percent wage loss for the period from February 26, 1996, to August 19, 1996, utilized the same \$211.56 average weekly wage as was used in the calculation of the temporary total disability compensation. The Appeals Board, in reviewing the evidence, considers it appropriate to include the \$101.95 benefit package in the average weekly wage, giving claimant an average weekly wage of \$313.51 for the period of time between February 26 and August 19, 1996. This would increase the rate of disability during that period of time from \$141.05 per week to \$209.02 per week.

The Appeals Board notes the accommodated work offered on August 19, 1996, included a fringe benefit package identical to that which claimant was earning at the time of her regular employment. As such, the Appeals Board considers it appropriate to include the fringe benefit package in the imputed post-injury average weekly wage used to compute claimant's entitlement to benefits. The Administrative Law Judge used a \$170.24 post-injury wage figure to reach the 33.5 percent work disability. This included a 20 percent wage loss prong when comparing claimant's \$211.56 pre-injury and \$170.24 post-injury wages, neither of which included the fringe benefit package. The Appeals Board deems it more appropriate in comparing these numbers to include the fringe benefit package both pre- and post-injury. Therefore, the Appeals Board considers claimant's pre-injury wage for purposes of this calculation to be \$313.51 and her post-injury wage including fringe benefit to be \$272.19. Comparing the two computes to a 14 percent wage loss factor under K.S.A. 44-510e. In following the guidelines of K.S.A. 44-510e, both the tasks loss and wage loss factors must be considered and given equal weight. The 47 percent tasks loss and 14 percent wage loss prongs compute to a 30.5 percent permanent partial work disability beginning August 19, 1996.

The arguments by claimant's counsel that Foulk and its policies do not apply to injuries post-July 1, 1993, have been previously decided contrary to claimant's position in the case of Wollenberg v. Marley Cooling Tower Company, Docket No. 184,428, (Sept. 1995).

The arguments by claimant and respondent regarding the method of calculating the award have also been answered by the Workers Compensation Appeals Board. See Wollenberg, supra. See also Bohanan v. USD 260, Docket No. 190281, (Nov. 1995).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore, dated May 13, 1997, should be, and is hereby, modified and claimant, Catherine J. Deist, is granted an award against respondent, Dillon Companies, Inc., a qualified self-insured, for an injury occurring on December 29, 1994.

Claimant is entitled to 62 weeks of temporary total disability compensation at the rate of \$141.05 per week in the amount of \$8,745.10, followed by 24.86 weeks permanent partial disability compensation at the rate of \$209.02 per week in the amount of \$5,196.24 for the period February 26, 1996, to August 19, 1996, based upon an average weekly wage of \$313.51 and a permanent partial disability of 73.5 percent to the body as a whole.

As of August 19, 1996, claimant's work disability is modified and claimant becomes entitled to 87.38 weeks of permanent partial disability compensation at the rate of \$209.02 per week in the amount of \$18,264.17 for a total award of \$32,205.51.

As of August 8, 1997, claimant would be entitled to 62 weeks of temporary total disability compensation at the rate of \$141.05 per week in the amount of \$8,745.10, followed by 74.57 weeks of permanent partial disability compensation at the rate of \$209.02 per week in the amount of 15,586.62, which is ordered paid in one lump sum minus the amounts previously paid. Thereafter, claimant is entitled to benefits at the rate of \$209.02 for 37.67 weeks in the amount of \$7,873.78, until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is, herein, affirmed insofar as it is not in contravention to the orders expressed herein.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Scott J. Mann, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director